

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PEGGY DITCH)	
Claimant)	
VS.)	
)	
PONY EXPRESS DELIVERY SERVICE, INC.)	Docket No. 245,631
Respondent)	
AND)	
)	
INSURANCE COMPANY STATE OF)	
PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the June 21, 2000 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on December 8, 2000, in Topeka, Kansas.

APPEARANCES

Thomas Odell Rost of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a May 14, 1999 accident and an alleged injury or aggravation to the left knee. In the June 21, 2000 Award, Judge Avery determined that claimant sustained a temporary injury or temporary aggravation to the left knee and, therefore, awarded claimant both unauthorized and future medical benefits, along with 49.12 weeks of temporary total disability benefits. In the Award, the Judge also addressed claimant's request for penalties for respondent and its insurance carrier's failure to pay the temporary total disability benefits that were awarded at preliminary hearing. The Judge granted the

request for penalties and ordered respondent and its insurance carrier to pay claimant penalties in the sum of \$100 per week "commencing January 27, 2000 until all temporary total benefits ordered by the court have been paid."

Respondent and its insurance carrier contend Judge Avery erred. They argue that (1) claimant failed to prove that she sustained any injury in the alleged May 14, 1999 accident as claimant had a serious preexisting knee problem and there allegedly is little evidence to prove that the alleged accident caused any lesion or change to the knee's physical structure; (2) in the event claimant injured her knee in the alleged accident, benefits should be limited for a period of only six to eight weeks, as the medical evidence allegedly indicates that the temporary aggravation to the knee should have resolved in that period; (3) claimant failed to prove that respondent and its insurance carrier did not pay the temporary total disability benefits due claimant after more than the 20 days following written demand that is allowed by statute and, therefore, the request for penalties should be denied; (4) at the regular hearing claimant did not request penalties for the failure to pay medical expenses; therefore, those penalties should not be ordered; and (5) they are entitled to reimbursement from the Workers Compensation Fund for any overpayment of benefits.

Conversely, claimant argues in her brief to the Board that (1) the award of benefits and penalties should be affirmed and (2) the Board should assess penalties against respondent and its insurance carrier for their failure to pay a \$342 medical bill incurred with Dr. Kurt R. Knappenberger.

At oral argument before the Board, the parties narrowed the issues to be decided on this review to the following:

1. Did claimant injure her left knee in the alleged May 14, 1999 accident?
2. If so, for what period is claimant entitled to receive temporary total disability benefits and medical benefits?
3. Should penalties be assessed for the failure to pay either medical expenses or temporary total disability benefits?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. On May 14, 1999, claimant injured her left knee stepping off a curb while making deliveries for respondent. At the time of the accident, claimant felt a sharp pain in her knee, which immediately began to swell and became so painful that she was unable to put any weight on it. Claimant promptly reported the incident to a supervisor and promptly

sought medical treatment. Ultimately, the insurance carrier authorized claimant to treat with Dr. Kurt R. Knappenberger, who had previously treated claimant's left knee.

2. In November 1998, claimant had injured her left knee while on board a commercial jet plane. In that accident, claimant tore the anterior cruciate ligament and received medical treatment from Dr. Knappenberger. The doctor operated on claimant's left knee in December 1998 and followed claimant post-operatively until May 11, 1999, when he released her with directions to return as needed. At that time the doctor noted claimant had problems with knee instability, but he found no swelling and expected the instability to improve with strengthening. Three days after Dr. Knappenberger's release, claimant reinjured her knee in the May 1999 accident.

3. Claimant saw Dr. Knappenberger on May 17, 1999. The doctor began a new period of treatment, which included a repeat injection, and also recommended claimant be off work. Dr. Knappenberger diagnosed a knee strain.

4. Following a September 2, 1999 preliminary hearing, Judge Avery appointed Dr. Sergio Delgado, an orthopedic surgeon, to evaluate claimant. In an October 19, 1999 letter to the Judge, Dr. Delgado stated that he believed claimant's symptoms were aggravated by the May 14, 1999 incident but that the aggravation had resolved. The doctor wrote, in part:

It appears that Ms. Ditch's complaints are a natural and probable consequence of the prior left knee injury with the degenerative arthritic changes being a natural consequence of anterior cruciate damage with instability. **Her symptoms were aggravated by the injury sustained and this aggravation has resolved at this time.** I would expect that she will have no additional impairment from the injury sustained on May 14, 1999. (Emphasis added.)

5. By preliminary hearing Order dated January 27, 2000, Judge Avery ordered respondent and its insurance carrier to pay claimant temporary total disability benefits at \$144.91 per week commencing May 17, 1999, and continuing "until further order, or until certified as having reached maximum medical improvement; or released to regular job; or until returned to gainful employment, whichever occurs first." The Order also authorized Dr. Knappenberger to treat claimant.

6. On January 28, 2000, claimant demanded payment of 35 weeks of temporary total disability benefits totaling \$5,069.40 and \$342 for medical expense that had been incurred. The demand letter that was mailed to respondent and its insurance carrier's attorney read:

This letter constitutes demand pursuant to K.S.A. 44-512a for payment of the compensation awarded by Administrative Law Judge Brad Avery on January 27, 2000, as follows:

Temporary total disability compensation is hereby granted and ordered paid by respondent and insurance carrier at the rate of \$144.91 per week, commencing May 17, 1999, until further order, or until certified as having reached maximum medical improvement; or released to regular job; or until returned to gainful employment, whichever occurs first.

Medical treatment is ordered to be paid by respondent and insurance carrier on claimant's behalf with Dr. Knappenberger until further order or until certified as having reached maximum medical improvement.

If payment is not received for all past due compensation within the twenty-day period prescribed by K.S.A. 44-512a, the claimant will proceed to take appropriate action under that statute. The items unpaid and past due are:

TTD for 35 weeks in the amount of	\$5,069.40
Medical (up to but not including 1/27/00)	<u>342.00</u>
	\$5,753.40 [sic]

This letter is a continuing demand for all compensation, which becomes unpaid and past due hereafter under the above-described Award.

According to the documents filed with the Division of Workers Compensation, respondent and its insurance carrier's attorney received the above letter on January 31, 2000.

7. On February 7, 2000, respondent and its insurance carrier appealed the January 27, 2000 preliminary hearing Order to this Board for review.

8. After deposing Dr. Knappenberger, respondent and its insurance carrier requested an order terminating the preliminary hearing benefits that had been ordered. Following a hearing, by Order dated March 3, 2000, Judge Avery terminated claimant's preliminary hearing benefits as of February 10, 2000. The March 3, 2000 Order was not appealed.

9. On March 8, 2000, claimant's attorney sent respondent and its insurance carrier's attorney a second letter demanding payment of compensation. That letter read:

This letter constitutes demand pursuant to K.S.A. 44-512a for payment of the compensation awarded by Administrative Law Judge Brad Avery on March 7 [sic], 2000, as follows:

Payment of TTD is due claimant per Judge Avery's order dated January 27, 2000 in the amount of \$144.91 per week, commencing May 17, 1999, to be paid through February 10, 2000.

If payment is not received for **all past due** compensation within the twenty-day period prescribed by K.S.A. 44-512a, the claimant will proceed to take appropriate action under that statute. The items unpaid and past due are:

TTD for 7-12-99 through 2-20-2000 in the amount of \$4,347.30	
Medical	342.00
	\$4,689.30

This letter is a second demand for all compensation, which has become unpaid and past due hereafter under the above-described Award dated January 27, 2000, and a continuing demand for all compensation under the Award dated March 7 [sic], 2000.

The Board assumes the February 20, 2000 date used in the above letter is a typographical error as the Judge terminated benefits as of February 10, 2000. The record does not disclose when the March 8, 2000 demand letter was delivered to respondent and its insurance carrier's attorney.

10. On March 23, 2000, Judge Avery combined and conducted both the regular hearing and penalties hearing. At that hearing, the parties agreed that claimant had been paid eight weeks of temporary total disability benefits at \$144.91 per week totaling \$1,159.28. The Judge also announced that claimant was claiming additional temporary total disability benefits from July 12, 1999, until February 10, 2000. Respondent and its insurance carrier's attorney announced that \$342 in medical expense was outstanding as the bill was under review for compliance with the workers compensation fee schedule. The parties also introduced into evidence a copy of a check from the insurance carrier drawn in the sum of \$1,159.28 which, on its face, indicated that it was tendered as payment for the temporary total disability benefits for the period from May 17, 1999, through July 11, 1999. The record does not indicate when claimant received that check but the check was dated March 1, 2000. When reciting the issues, the Judge noted that claimant was seeking penalties for the failure to pay temporary total disability benefits. But the Judge did not note that penalties for the failure to pay outstanding medical expenses was an issue to be decided, and claimant's attorney did not correct the record.

11. On March 30, 2000, the Board entered its Order in the appeal from the January 27, 2000 preliminary hearing Order. The issue addressed in that appeal was whether claimant's alleged May 14, 1999 knee injury constituted a new injury or, instead, whether it was only a direct and natural consequence of an earlier noncompensable injury. Based

upon the preliminary hearing evidence, the Board affirmed the Judge's finding that claimant had sustained a compensable accident on May 14, 1999, resulting in injury to the left knee. Therefore, the Board affirmed the January 27, 2000 Order.

CONCLUSIONS OF LAW

1. The Award should be modified.
2. An injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates a condition.²
3. The Board affirms the Judge's finding and conclusion that on May 14, 1999, claimant sustained personal injury by accident arising out of and in the course of employment with respondent. The greater weight of the evidence indicates that claimant temporarily aggravated her previously injured left knee and, therefore, claimant is entitled to receive both medical benefits and temporary total disability benefits for that temporary injury.
4. One of the principal issues in this claim is the length of time that claimant was rendered temporarily and totally disabled as a result of the May 14, 1999 accident. The medical evidence is uncontroverted that claimant sustained only a temporary injury or aggravation to her left knee in that accident. But the evidence is not clear as to when that injury resolved. Dr. Knappenberger was very unsure and could only guess that claimant's temporary aggravation lasted from six to eight weeks. On the other hand, Dr. Delgado determined that claimant's temporary aggravation had resolved by the time he examined claimant on October 19, 1999.

Considering the degree of Dr. Knappenberger's uncertainty, the Board concludes that October 19, 1999, is the better estimate of the date that claimant's temporary injury resolved. Therefore, the Board concludes that claimant was temporarily and totally disabled from engaging in any substantial, gainful employment from the date of accident on May 14, 1999, through October 19, 1999.
5. The Workers Compensation Act provides that a worker is entitled to receive a civil penalty when compensation is not paid when due. The worker must serve written demand upon the employer and its insurance carrier that specifically identifies the disability compensation or medical expense that is claimed to be unpaid. But the employer and its

¹ Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

² Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

insurance carrier can avoid the civil penalty by paying the compensation within 20 days after receiving the written demand. The penalty statute provides, in part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the **employee shall be entitled** to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of **not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.**³ (Emphasis added.)

6. Appeals of preliminary hearing awards do not stay the medical compensation and temporary total disability compensation that accrue after the date of the preliminary award. Conversely, the appeal does stay the payment of medical compensation and temporary total disability benefits that accrued before the date of the preliminary award.⁴ Therefore, when claimant served written demand upon respondent and its insurance carrier's attorney on January 31, 2000, only a few days of temporary total disability benefits had accrued that were not subject to the automatic stay.

7. By Order dated March 3, 2000, the Judge determined that claimant's temporary aggravation had resolved and, therefore, the benefits for that aggravation should be terminated. Although the Judge designated the date of February 10, 2000, as the date the temporary total disability benefits should cease, 5.29 weeks of benefits had accrued from the date of the January 27, 2000 preliminary hearing Order through March 3, 2000. Therefore, 5.29 weeks of temporary total disability compensation were due and owing at the time of claimant's March 8, 2000 demand letter. In theory, commencing January 27, 2000, respondent and its insurance carrier should have been paying claimant's temporary total disability benefits until the Judge issued the March 3, 2000 Order, with the understanding that they had the right to seek reimbursement from the Workers

³ K.S.A. 44-512a.

⁴ See K.S.A. 1999 Supp. 44-534a(a)(2).

Compensation Fund in the event an overpayment existed at the conclusion of the claim. The Workers Compensation Act provides:

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund . . . for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee . . . as determined in the full hearing on the claim.⁵

8. Despite written demands, the 5.29 weeks of temporary total disability compensation that had accrued between January 27, 2000, and March 3, 2000, had not been paid as of the March 23, 2000 regular hearing.

Additionally, once the Board affirmed the January 27, 2000 preliminary hearing Order, all the weeks of temporary total disability benefits that had been subject to the automatic stay also became payable. As of the Board's March 30, 2000 Order, the 36.43 weeks of benefits that had accrued from May 17, 1999, through January 26, 2000, which had been awarded in the January 27, 2000 preliminary hearing Order, became immediately payable. Therefore, as of the Board's March 30, 2000 Order, respondent and its insurance carrier owed claimant temporary total disability benefits under the preliminary hearing awards for the period from May 17, 1999, through March 3, 2000; less, of course, the eight weeks of benefits represented by the March 1, 2000 check.

9. Respondent and its insurance carrier argue that they should not be assessed penalties. The Board believes the heart of this penalties issue is whether employers and their insurance carriers will be allowed to disregard preliminary hearing awards and unilaterally determine when they will or will not comply with those orders or whether, instead, preliminary hearing awards will be enforced with the understanding that employers and their insurance carriers may look to the Workers Compensation Fund for any overpayment of benefits that exists at the conclusion of the claim.

10. The Board concludes that preliminary hearing awards should be enforced. The Board finds that it is egregious conduct to ignore a preliminary hearing award and refuse to pay a worker the temporary total disability benefits that are ordered. Temporary total disability compensation is intended as wage replacement. The failure to pay those benefits

⁵ K.S.A. 1999 Supp. 44-534a(b).

can cause severe financial hardship as some injured workers are solely dependent upon them for support.

11. The Board concludes that respondent and its insurance carrier failed to pay claimant the temporary total disability benefits that were due under the terms of the preliminary hearing awards. During the pendency of the preliminary hearing appeal, respondent and its insurance carrier failed to pay the 5.29 weeks of temporary total disability compensation that was due for the period from January 27, 2000, through March 3, 2000, the date that the original preliminary hearing Order was modified. Therefore, claimant is entitled to receive those weeks of temporary total disability compensation along with penalties in the sum of \$100 per week from January 27, 2000, until those 5.29 weeks of temporary total disability benefits are paid.

Additionally, claimant is entitled to receive penalties in the sum of \$100 per week commencing March 30, 2000 (the date of the Board's decision in the preliminary hearing Order appeal), until the temporary total disability benefits are paid for the 36.43-week period from May 17, 1999, through January 26, 2000. But there shall be no additional penalty assessed for any weeks that the penalty assessed for failing to pay this 36.43-week period overlaps with the weeks that penalty is assessed in the preceding paragraph. Further, the respondent and its insurance carrier are entitled to a credit for the eight weeks of benefits paid claimant represented by the March 1, 2000 check.

12. Pursuant to the preliminary hearing awards entered in this claim and the benefits that accrued under those awards, claimant is entitled to receive temporary total disability benefits for the period from May 17, 1999, through March 3, 2000. Therefore, for final award purposes, claimant is entitled to receive 34 weeks of temporary total disability compensation. That number represents the 22.57 weeks from May 14, 1999, through October 19, 1999, when claimant was temporarily and totally disabled; plus 19.43 weeks of temporary total disability benefits for the period from October 20, 1999, through March 3, 2000, that were awarded at preliminary hearing but never paid and which do not overlap with the former period; less the eight weeks of temporary total disability benefits paid by the March 1, 2000 check for the period of May 17, 1999, through July 11, 1999.

13. Once respondent and its insurance carrier satisfy the award of temporary total disability compensation, they may seek reimbursement for overpayment from the Workers Compensation Fund.

14. Claimant is not entitled to penalties for respondent and its insurance carrier's failure to pay medical expense. That request was not made an issue before the Judge at the regular hearing and the Board will not consider it for the first time on appeal.

15. Claimant is entitled to an award of authorized medical benefits for the medical treatment administered from May 14, 1999, through October 19, 1999. Likewise, claimant is granted unauthorized medical benefits up to the \$500 statutory maximum.⁶

16. The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the June 21, 2000 Award and grants claimant the penalties for failing to pay temporary total disability benefits as specified in paragraph #11 in the Conclusions of Law; grants claimant authorized medical benefits for the period from May 14, 1999, through October 19, 1999; orders respondent and its insurance carrier to pay claimant 42 weeks of temporary total disability benefits at \$144.91 per week, or \$6,086.22, less any amounts previously paid; and grants claimant unauthorized medical benefits up to the statutory maximum.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas Odell Rost, Topeka, KS
Matthew S. Crowley, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

⁶ See K.S.A. 1998 Supp. 44-510(c)(2).